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The Humane Society for Seattle/King County and Animal Control Officers Guild, Petitioner. Case 19–RC–15235

October 28, 2010

DECISION AND DIRECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

The National Labor Relations Board has considered objections to and determinative challenges to an election held September 29, 2009, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 15 for and 14 against the Petitioner, with 2 challenged ballots.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations.¹

I.

The Employer operates an animal welfare and placement center. The Animal Control Officers Guild (the Petitioner or ACOG) seeks to represent certain of the Employer's advisors, technicians, assistants, coordinators, and receptionists. At the time of ACOG's petition, it represented one bargaining unit of animal control officers, sergeants, veterinary technicians, and adoption counselors employed by another employer, King County Animal Care and Control Shelter (KCACC). After the election was conducted on September 29, 2009,2 the Employer filed objections to the election alleging, inter alia, that ACOG misrepresented to the employees the identity of their prospective bargaining representative. According to those objections, ACOG represented to employees that they were voting for their own, independent, Seattle Humane Society (SHS) Union.

After ACOG petitioned for an election, around August 24, the Employer held an all-staff meeting at which Human Resources (HR) Director Tina Leader spoke. There had been rumors of a possible closing of KCACC, with the possible transfer of animals from KCACC to SHS. At the meeting, employees expressed concern about a KCACC closing and the possibility of KCACC employ-

² All dates are in 2009.

ees claiming jobs at SHS if animals were transferred there, to the detriment of SHS employees. It was well known that ACOG was the representative of the employees at KCACC; in fact, KCACC constituted the only unit represented by ACOG.

On August 25, 15–20 SHS employees gathered for the first meeting held to discuss union representation. Employee Traci Garcia, ACOG's agent and the leader of the organizing campaign, planned the meeting, and invited ACOG's president, John Diel, to speak. Diel told employees that ACOG was there to guide the employees on how to form and operate their own union. Garcia emphasized that SHS would be separate from ACOG, that they would have their own SHS union if ACOG was voted in, that ACOG would have no involvement whatsoever, and that they would have their own contract and own officers. Employees Maria Tcruz and Ashley Heller seconded Garcia's statements, saying that SHS would have its own union and that ACOG would not be part of it.

ACOG President Diel testified that there were questions about how the SHS employees would be differentiated if they became members of ACOG. He assured the SHS employees that they would not necessarily be in the same unit as the animal control officers, that they would form their own executive board, and that ACOG would be there to give assistance and guide them, but would not dictate anything. During the meeting, employee Jennifer Juroch asked Diel whether ACOG would have any part in the SHS union. He replied that for now, if a yes vote went through, SHS would be just piggybacking ACOG until SHS union got established.

The minutes from the meeting were distributed by email to employees who provided their email addresses at the meeting, and were also placed in the employee lounge. The minutes confirmed that SHS employees would have their own union separate from ACOG, and stated in relevant part,

The KCAC Officers Guild is helping the SHS union petition process by sponsoring our petition with the NLRB and allowing us to use their labor union lawyer pro bono. Once the petition has been submitted the NLRB holds a secret ballot election at the workplace with eligible employees to determine if the union will be voted in at the organization, in this case SHS. When and if the SHS union is voted in we will be a separate independent union, as in separate from the KCAC Officers Guild and not affiliated with any national or international union organization.

The minutes further stated that the SHS union would create its own contract and decide bargaining points.

¹ In the absence of exceptions, we adopt, pro forma, the hearing officer's overruling of the two challenged ballots and Objections 5 and 6.

Upon reviewing the minutes at the hearing, ACOG President Diel testified that the author probably meant "separate bargaining unit," not "separate independent union," but admitted that ACOG did not send employees any clarifying correspondence related to the minutes.

On either September 10 or 11, the Employer held a departmental meeting with employees. Employee Tcruz commented that ACOG was not going to have anything to do with them and that they would be a completely different union. HR Director Leader reiterated that ACOG was the petitioner and that there was a difference between a union having separate units and contracts and a completely separate union. Both employees, Tcruz and Peter Brodkin, adamantly stated, however, that "[w]e are going to be a completely separate union. ACOG will have nothing to do with us."

On September 11, a second union meeting was held with employees. ACOG President Diel and ACOG Attorney Sydney Vinnedge were present, and sample ballots were passed around. Diel testified that he explained at the meeting that ACOG would not be getting involved in separate bargaining agreements and units. Diel stated that "[t]he intention of forming their bargaining unit wasn't to take control of them. It was to assist them in improving their working conditions." Diel further testified that he said the SHS employees would have their own collective-bargaining agreement separate from ACOG members in the King County employees bargaining unit, their own negotiation committee, their own bylaws, and decide on union dues. Consistent with his statements to employees at this meeting, Diel testified at hearing that he did not believe SHS employees would even participate in the election of ACOG officers.

The minutes from this meeting were similarly distributed to employees, and stated in part (emphasis in original):

Sydney [ACOG Attorney] says that the most common thing for the anti-union campaign to attack is the petitioning union (which would be King County Animal Control Officer's Guild in our case). This is a mistake. Why? Because we are voting to create our OWN union; which leads to the biggest question of this election.

What does King County ACOG have to do with the union election at SHS? King County is representing SHS employees to petition to create a union. They're representing us by lending us their lawyer (Syd Vinnedge) pro-bono (since SHS employees do not have the funds to hire our own lawyer). We (SHS employees) have the choice of joining the ACOG or creating our own union . . . ACOG is representing SHS employ-

ees by allowing us to piggy-back off another union in order to create OUR OWN union.

Upon reviewing the minutes at the hearing, Diel again testified that the author "had the terms mixed up," and used the word "union" where "bargaining unit" was meant. ACOG agent Garcia admitted that she misused the words union and bargaining unit during the campaign, but claimed that by the September 11 meeting she had a better understanding of the terms.

On September 17, the Employer held an all-staff meeting. HR Director Leader presented a poster-sized version of the ballot and read the language on it. Employee Tcruz retorted that the ballot was not right. Employee Brodkin said that what they were voting on was untrue and what Leader was holding was false. Chief Operating Officer David Loewe testified that employee Cindy Briggs said she had called the NLRB and was informed that the ballot wasn't true and did not represent what they would be voting on. Leader explained that the employees would be voting for representation by ACOG and would have a separate agreement, but that that was different from having a separate union. Other employees raised concerns and questions as to what the vote meant and whether the vote was for SHS union or ACOG.

On September 23, a final union meeting with employees was held. It is unclear how many employees attended this meeting. President Diel testified that during this meeting he explained that ACOG was the exclusive representative with separate KCACC and SHS bargaining units. He also discussed how the SHS unit would have to decide their own bylaws, dues and bargaining agreement and would have their own negotiating committee as well as their own executive board to conduct daily business.

Employee Brodkin testified that at a meeting with a small group of employees on September 24 or 25, ACOG agent Garcia passed out a document that clarified that ACOG would be the bargaining representative and that a unit consisting only of SHS employees would be created. There is no evidence of who authored the document or whether any other employees received this document.

HR Director Leader sent "all-staff" emails on September 15, 22, and 24 explaining that the employees would be voting to be represented by ACOG, the petitioning bargaining representative. Leader testified that despite these attempts, no one acknowledged her explanation or believed what was on the sample ballot she held up at the September 17 meeting.

On September 25, ACOG agent Garcia responded to Leader's September 24 email, stating (emphasis in original):

The ACOG is the petitioner but once the vote passes and we are certified, the SHS Union we will be separate from the ACOG in that we will have our own bylaws, elect our own board to represent us and create our own contract. If you look at the current ACOG bylaws it says basically that we are under them so we can utilize their resources since the SHS Union is a new organization and will need assistance in the beginning. The ACOG will not be involved with the [sic] how

On September 27, the Employer's CEO, Brenda Barnette, sent an email to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader emailed employees a link to a third-party article regarding "KCACC Guild's" petition and reasons the Guild would be bad for SHS.

the SHS Union will operate.

The election was conducted on September 29. Fifteen votes were counted for the Petitioner, 14 votes were counted against, and there were 2 challenged ballots.³ The Employer filed 6 objections to the conduct of the election. Objections 1 through 4 alleged that ACOG had made material misrepresentations concerning the meaning of a "yes" vote.

A hearing on all of the objections and the challenges was held before a hearing officer of the Board. At the hearing, employees Brodkin, Lisa Evans, Tiffany Braitsch, Garcia, and Heller all testified that they knew that they were voting for ACOG as the bargaining representative. Brodkin stated that he based his belief on the numerous emails and meetings. Employee Jordan Olsen testified that based on the August 25 meeting and discussions with other employees, they thought they were going to have their own separate union, apart from ACOG. He testified that given the hearsay regarding what was going on with KCACC, employees did not want to be affiliated with ACOG. Employee Juroch also testified that no one wanted to be under an ACOG union. She explained that those who favored the union found comfort and assurance believing they could form and operate their own union, and have nothing to do with ACOG. She also testified that those who understood that they would be represented by ACOG, expressed that they did not want to be.

The hearing officer recommended sustaining the Employer's objections, finding that throughout the campaign, ACOG agent Garcia repeatedly assured employees

they would be represented by an SHS Union and that ACOG would have nothing to do with the SHS Union. Subsequent meetings and minutes, the hearing officer found, reinforced Garcia's statements. The hearing officer further found that the confusion engendered by the meetings and minutes were not dissipated by the Employer or ACOG. Thus, the hearing officer found that at least some employees thought that they were voting for an SHS Union rather than for ACOG. ACOG excepts to the hearing officer's recommendations to sustain the Employer's objections. We agree with the hearing officer's recommendations based on those findings, for the reasons set forth below.

II.

The Board's fundamental objective in representation cases is to ascertain whether the employees in the voting unit wish to be represented by a particular labor organization or organizations. Achievement of this objective is impossible if, when they cast their ballots, the employees do not know the identity of the organization that they are voting for or against. In this case, there was widespread confusion among the unit employees regarding whether the voting concerned an existing union that represented employees of another employer or a newly organized union representing only the unit employees. This distinction was of critical importance to many unit employees. The confusion, moreover, resulted from statements of the Petitioner and its agents and likely affected the very close election result. The combination of all of the above-described circumstances precludes a finding that a majority of the unit employees selected the Petitioner as their representative. Accordingly, the election must be set aside.

The Board has previously set aside elections conducted under circumstances that created serious doubt over whether the employees knew which labor organization their vote addressed. In *Pacific Southwest Container*, 283 NLRB 79 (1987), the Board set aside an election in which the ballot contained the name of a local union that no longer existed. Prior to the election, as a result of the merger of international unions including the one with which the original petitioner was affiliated, the original petitioner ceased to exist and was included in a much

³ As stated, there are no exceptions to the hearing officer's recommendation to overrule the challenges to those 2 ballots. For purposes of this decision, we will assume that these ballots are votes for ACOG, making the election result 17–14 in ACOG's favor.

⁴ ACOG argues that the election should be upheld because the Employer has taken actions since the election that would affect laboratory conditions in a rerun election. ACOG has allegedly filed charges against the Employer regarding some of those actions. The postelection allegations in the charges, however, have no bearing on our decision here. Moreover, whether or not ACOG's charges would affect the scheduling of any second election is appropriately left for the Regional Director to resolve, subject to any party's right to request review by the Board, consistent with this Decision and Direction.

larger local union of the international union that resulted from the merger. The new local union, in addition to being much larger than the original petitioner and covering a much larger geographical jurisdiction, was "governed by entirely different officers, its executive board [was] 10 times larger, and its members [were] subject to a new constitution and bylaws." Id. at 80. The ballot, however, contained only the name of the original petitioner, not the new local into which it had been subsumed. At least one employee was unaware of the merger when he voted. The Board directed a new election, stating, "[W]e find that the election did not comport with Sec. 9(a) because we cannot ascertain that a majority of the employees intended to designate [the new, merged local] as their collective-bargaining representative." Id. at 80 fn. 7.

In Nevada Security Innovations, 337 NLRB 1108 (2002), on the other hand, a local union affiliated with, but a different labor organization than, the intervenor sent a letter to the unit employees inviting them to inspect the local's financial reports and visit the local's web site, and stating, "[w]e stand ready to represent you and invite you to be a member of the greatest Local Union on the West Coast." Id. at 1108 (internal quotation marks omitted). One week later, the intervenor sent its own letter to the unit employees urging them to vote for it, without mentioning the local union. Then, a few days later, the employer sent a letter to the unit employees responding to the local union's letter, stating that the local was not on the ballot and that the intervenor was. The employer's letter emphasized that the local and the intervenor were different and distinct organizations. The Board's notice of election clearly listed the intervenor on the sample ballot, and the ballots sent to and marked by the voters clearly identified the intervenor and did not include the local union. Id.

After the intervenor prevailed in the election, the employer filed an objection based on the local union's letter to the unit employees holding itself out as the proposed representative. The Board overruled the objection and certified the intervenor:

[W]e conclude that by the time the ballots were cast, employees would not reasonably have been confused over the identity of the labor organization seeking to represent them. Any confusion engendered by [the local union]'s letter would have been dissipated by the subsequent communications from [the intervenor] and the Employer, as well as by the Board's Notice of Election and the official election ballots. Thus, we conclude that the employees knew for which union they were voting, and that their right to select their bargaining representative was not compromised.

[Id. at 1109.]

In the case before us, we are unable to conclude that the employees knew for which union they were voting. They had been told by responsible officials of ACOG itself that their union, if they voted for union representation, would be separate from ACOG and that ACOG would have no involvement whatsoever. The record establishes that some employees' belief in ACOG's representations was so strong that when the Employer's HR director stated in a meeting that ACOG was the petitioner, these employees adamantly insisted in opposition that the employees would have a completely separate union and that ACOG would have nothing to do with them. When, at a subsequent meeting, the HR director displayed the sample ballot bearing ACOG's name, some employees insisted that the ballot displayed was false.

Significantly, the employee confusion reflected in the testimony at the hearing was the result of statements by officers and agents of ACOG itself. Moreover, ACOG stood to benefit from this confusion: the unit employees were outspokenly opposed to having anything to do with the employees of another employer, KCACC, and the collective-bargaining representative of the KCACC employees was ACOG.

It is true that both the ballot and the Board's notice of election clearly identified ACOG as the petitioner, and that an ACOG representative subsequently distributed a document clarifying that ACOG would be the bargaining representative and a separate unit would be created, though the record does not establish to how many employees the clarifying document was distributed. Five employees testified that by the time of the election they knew that they were voting for ACOG as representative. One employee, however, testified that he and other employees still thought that they were going to have their own separate union, apart from ACOG.

Because of the strong showing of employee confusion over the identity of the organization seeking representative status and the importance of the identity of the organization to this particular group of voters, because of the closeness of the vote, and because the confusion was created by ACOG's own conduct, we cannot conclude that a majority of the employees selected ACOG as their representative. See *Pacific Southwest Container*, 283 NLRB at 80 fn. 7.5

⁵ Our dissenting colleague argues that this case is governed by *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), and not *Pacific Southwest Container*, supra. In the latter decision, however, the Board distinguished between the issue addressed in *Midland*, whether false statements in campaign propaganda may serve as grounds for setting aside an election, and the question of whether the Board is able to ascertain that a majority of the employees in fact designated a par-

Our dissenting colleague asserts that communications to employees from the Employer and ACOG subsequent to ACOG's repeated misstatements about the identity of the union would have been sufficient to dissipate the confusion produced by the Petitioner's statements by the time of the election. The relevant communications include emails from the Employer to employees on September 15, 22, and 24, the September 17 all-staff meeting at which the Employer's HR director displayed a postersize sample ballot, and union meetings held on September 23 and 24 or 25. The dissent argues that on the basis of these communications, reasonable employees would have concluded that ACOG would be their representative if they voted for representation, but they would constitute a separate bargaining unit and a separate, autonomous division within ACOG.

Even if reasonable individuals might have reached the conclusions suggested by the dissent, that does not exclude the likelihood that a significant number of employees reasonably remained confused about the true nature of the union on the ballot. Indeed, it is clear from the record that confusion in fact persisted among the employees. At the September 17 all-staff meeting, despite the Employer's September 15 email message and the HR director's display of an enlarged sample ballot, employees insisted that their vote for representation was for a union separate and independent from ACOG. Whether the later communications relied on by the dissent might have achieved greater success is highly speculative, especially since the record does not reflect that many employees attended the union meetings at which clarifications were offered. The record does show, however, that at least some confusion remained through the election. As described, more than one employee thought at the time of the election that the voting was for or against a union other than ACOG. In those circumstances, we cannot agree that the employer and union communications dissipated the effect of ACOG's earlier misstatements about the identity of the Petitioner sufficiently for us to conclude that the employees who voted "yes" were voting for representation by ACOG.⁶ As a result, and con-

ticular union as their representative. 283 NLRB at 80 fn. 7. The latter inquiry, the Board held in *Pacific Southwest Container*, does not implicate the issue addressed in *Midland* and the result is not governed by *Midland*.

The dissent also argues that *Suburban Newspaper Publications*, 230 NLRB 1215 (1977), was overruled by *Midland*. In reaching our decision today, we do not rely on *Suburban Newspaper Publications*, and to the extent that the hearing officer relied on it, we do not adopt her report.

⁶ A crucial distinction between this case and *Nevada Security Innovations*, supra, upon which the dissent principally relies for this point, is that the source of the misinformation in that case was a third party, while in this case it was ACOG itself. Setting aside an election based

sidering that a change of just two votes would change the election result, we cannot certify the ACOG as the representative of the employees.

DIRECTION

It is directed that the Regional Director for Region 19 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of employees Ashley Heller and Christy Thomson. The Regional Director shall then serve on the parties a revised tally of ballots, including the count of the ballots named above. If the revised tally shows that the Petitioner received a majority of the valid votes cast, the Regional Director is directed to set aside the election and order a new election, at such time as the Regional Director deems appropriate. If the revised tally shows that the Petitioner did not receive a majority of the valid votes cast, the Regional Director shall issue a certification of results of election.

Dated, Washington, D.C. October 28, 2010

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BECKER, dissenting.

Contrary to my colleagues and the hearing officer, I would overrule the Employer's Objections 1 through 4 asserting essentially that the Petitioner, Animal Control Officers Guild (ACOG), made misrepresentations to unit employees suggesting that a majority vote in favor of representation would result in the employees being represented by a union consisting only of Humane Society employees. I would overrule the objection for two reasons.

First, the evidence here establishes "that by the time the ballots were cast, employees would not reasonably have been confused over the identity of the labor organization seeking to represent them." *Nevada Security Innovations*, 337 NLRB 1108, 1109 (2002) (holding that subsequent communications dissipated effect of "letter sent to employees by an affiliate of the Intervenor mis-

on third-party conduct raises serious issues of fairness. For example, in *Phoenix Mechanical*, 303 NLRB 888 (1991), the Board declined to set aside an election based on conduct of a third party that might have created confusion about the identity of the petitioner, explaining that it "accords less weight to conduct by a nonparty." Id. at 888. This was undoubtedly among the "circumstances" considered by the Board in *Nevada Security* in declining to set aside the election, 337 NLRB at 1109, though it was not specifically articulated.

represent[ing] that the affiliate would be appearing on the ballot"). The evidence reveals the following clarifying communications. On September 17, 12 days before the election, the Employer held a meeting of all staff at which its human resources director presented a postersized reproduction of the ballot and read it aloud. She explained that the employees would be voting for representation by ACOG. At the final union organizing meeting held on September 23, 6 days before the election, ACOG's president clarified to employees that ACOG would be the employees' bargaining representative. The very next day, the Employer sent an email message to all employees making the same point: that employees would be voting for ACOG as their bargaining representative. Indeed, the Employer had already sent a similar email message to all employees on September 22. On September 25, the lead employee union activist reiterated this point at an employee meeting. Further dispelling any doubt was the Board's notice of election clearly naming ACOG on the sample ballot. Finally, of course, it is undisputed that the official election ballots marked by every voter plainly stated that employees were voting for ACOG as their bargaining representative.

Any confusion engendered earlier in the election campaign as to whether employees were voting to create and be represented by their own union rather than to be represented by ACOG was dissipated, as in Nevada Security *Innovations*, supra, by both the union's and employer's subsequent communications as well as by the Board's notice of election and the official election ballots. Id., 337 NLRB at 1109 (applying objective standard and finding employees not reasonably confused as to which union they were voting for in light of clarification by both parties and official Board documents). Having seen the poster-sized reproduction of the ballot, been told by both the Employer and the Union that they were voting to be represented by ACOG, possibly having read the Board's election notice, and certainly having read the unambiguous ballot, employee-voters could not reasonably have believed that a yes vote would do anything other than designate ACOG as their representative.¹

In light of the Union's clarifications, the Employer's explanations, and the Board's official notice and ballot, reasonable employees would have understood the Union's earlier representations to be what they were promises that ACOG would grant the unit the greatest possible autonomy. ACOG might well have kept those promises by, for example, creating a separate division for the Humane Society employees, permitting them to elect their own officers, select their own stewards, and negotiate their own collective-bargaining agreement. After creating such an autonomous division, ACOG might even have severed the division as an autonomous local, which could have successfully demanded that the Employer continue to recognize it as ACOG's successor under the standards for finding "substantial continuity" applied in Raymond F. Kravis Center for the Performing Arts² and similar Board decisions, or even petitioned the Board to amend the original certification to name the new, autonomous organization.³ If a union does not keep such promises and especially if a union never intended to keep such promises, it should suffer the consequences both in bargaining, when it may confront a lack of employee support, and at the polls after the filing of a decertification petition. The Board should not and need not police such promises, and certainly not through objections to an election occurring before the promised actions could be taken.

Second, I would hold that the alleged misrepresentation at issue here should be evaluated under Midland National Life Insurance, 263 NLRB 127 (1982), and make clear that Suburban Publications, 230 NLRB 1215 (1977), cited by the hearing officer, was overruled by Midland. In Suburban Publications, the Board held in 1977 that an election should be set aside when a union that had filed a petition to jointly represent employees together with a separate union erroneously represented to employees that it would be the sole representative after certification. But 5 years later, in 1982, the Board held in Midland: "we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements." Id. at 133. The exception to this general rule created in Midland, for forged documents, has no application here. The holding in Midland was based on the entirely appropriate premise that employees are capable of assessing campaign repre-

¹ The testimony of voters cited by my colleagues concerning their subjective understanding of the implications of a yes vote should be discounted. Such testimony may show that individual voters remained confused, but our standard is an objective not a subjective standard, and the evidence here clearly shows that no voters could reasonably have remained confused about what they were voting for. See *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (Board applies objective test to determine whether the conduct of a party to an election has the tendency to interfere with employees' free choice). Moreover, the fact that of the six employees who testified, five stated that they understood that they were voting to be represented by ACOG and only one remained confused strongly suggests that the remaining confusion was not reasonable under the circumstances that existed here.

² 351 NLRB 143, 145, 147–148 (2007) (employer's bargaining obligation remains following merger creating a new local so long as it does not result in changes sufficiently dramatic to alter the union's identity), enfd. 550 F.3d 1183 (D.C. Cir. 2008).

³ See Board Rules and Regulations Sec. 102.60(b) (labor organization may file a petition for amendment of certification).

sentations. Id. at 132–133. If anything, that premise is more true here than in ordinary cases of campaign promises and charges, because here the simple fact that a yes vote would result in representation by ACOG was plainly stated on the Board's official election notice and on the ballot.

While the hearing officer observed that the Board declined to apply Midland in Nevada Security Innovations, in fact, the Board overruled the objection in the latter case as explained above. Moreover, the Board in Nevada Security Innovations based its decision not to apply Midland on the holding in Pacific Southwest Container, 283 NLRB 79 (1987), not Suburban Publications. My colleagues rely exclusively on Pacific Southwest, but Pacific Southwest was not, in fact, a misrepresentation case. Rather, in *Pacific Southwest*, after the petition was filed, the petitioning union merged with a new, larger labor organization with different officers, constitution, bylaws, and geographic jurisdiction. The resulting problem was thus not a party's misrepresentation of the effect of the vote, but rather, as explained in Nevada Security Innovations, that "the correct, surviving labor organization was not listed on the ballot." 337 NLRB at 1108. Thus, the Board made clear in Pacific Southwest that the hearing officer had correctly distinguished Midland because it was "not setting aside the election" based on any misrepresentation. 283 NLRB at 80 fn. 7. Rather, the Board based its holding on the premise "that the correct labor organization must be listed on the ballot." Id. at 80 and fn. 7. The instant case and the earlier Nevada Security Innovations case are both distinguishable from Pacific Southwest on the simple but fundamental grounds that the Board's notice of election and election ballots accurately stated the choice being presented to employees. The holding in Security Innovations thus in no way suggests that misrepresentations concerning the effect of employees' vote should not be treated under the Midland standard. Because, as explained above, there is no reason grounded in policy not to do so, I would apply Midland here and dismiss the objections for that reason as well.

Dated, Washington, D.C. October 28, 2010

Craig Becker, Member

NATIONAL LABOR RELATIONS BOARD